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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 37.

LLOYD A. FRY ROOFING COMPANY,
Petitioner,

vs.

SCOTT WOOD et al., Individually and as Members of and
Composing the Arkansas Public Service Commission,
Respondents.

BRIEF

**Filed on Behalf of Petitioner, Lloyd A. Fry Roofing
Company.**

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Respondents.

BRIEF

**Filed on Behalf of Petitioner, Lloyd A. Fry Roofing
Company.**

MAY IT PLEASE THE COURT:

Comes the petitioner, Lloyd A. Fry Roofing Company,
and respectfully submits this its brief in the above-styled
cause.

OPINIONS BELOW.

The opinion of the Chancery Court of Pulaski County,
Arkansas (R. 219), is unreported. The majority and dis-
senting opinions of the Supreme Court of Arkansas (R. 225,
232) are unreported. The per curiam order of the Supreme
Court of Arkansas (R. 237) is unreported.

JURISDICTION.

The jurisdiction of this court is invoked under Title 28, U. S. Code, Section 1257 (3).

Petition for certiorari was duly filed on April 21, 1952, and granted by order of this court on June 2, 1952.

Although the Federal questions here involved were not discussed by the opinion of the majority of the Supreme Court of Arkansas (R. 225), allusion was made thereto in the dissenting opinion (R. 232), and all of such questions were specifically and properly presented by brief, oral argument and petition to rehear (R. 234), considered by and determined adversely to the interests of petitioner by the Supreme Court of Arkansas, all as is reflected by "Certificate as to Existence of a Federal Question" (R. 238).

QUESTION PRESENTED.

Congress having pre-empted the field of interstate motor carrier transportation, the question presented is the extent to which state regulatory bodies may, by indirection in administering state statutes designed to permit regulation by such bodies of intrastate common and contract motor carrier transportation, regulate, unduly burden and destroy interstate commerce performed by private carriers of property by motor vehicle, whereby such private carriers are deprived of their property without due process of law.

STATUTES INVOLVED.

Statutory provisions and administrative regulations involved are as follows:

Part II, Interstate Commerce Act, 49 Stat. L. 543, as amended, U. S. Code, Title 49, Chapter 8, Secs. 301 et seq., pertinent portions thereof being attached hereto as Appendix A:

National Transportation Policy as enunciated by Congress (54 Stat. L. 899; U. S. Code, Title 49, Notes Preceding Sections 1, 301, 901 and 1001) attached hereto as Appendix B.

Act 367 of the Acts of Arkansas, 1941 (Arkansas Motor Carrier Act), pertinent portions being attached hereto as Appendix C.

Rules and regulations governing motor carriers promulgated by the Arkansas Corporation Commission, pertinent portions being attached hereto as Appendix D.

STATEMENT OF THE CASE.

Praefatio.

Inasmuch as there is no dispute with respect to any material fact of record we take the liberty of submitting this preliminary statement before complying with the rules of court by making specific reference to the pages of the transcript of record.

Petitioner, Lloyd A. Fry Roofing Company, hereinafter referred to as Fry, is the largest manufacturer and distributor of asphalt roofing products in the United States, having manufacturing plants at twenty-one places in the United States, from which it sells and distributes its products throughout the width and breadth of the forty-eight states. One of such plants is located at Memphis, Tennessee, from which plant petitioner sells and distributes its products to customers located in a number of points in Arkansas and other states.

In the fall of 1949, as a part of a newly adopted pricing and distribution method and system, Fry, in order to eliminate warehousing problems and circumvent inherent disadvantages attendant upon existing transportation facilities, began making delivery of its products by the use of motor vehicle equipment consisting of tractor-trailer units leased by it under the terms of long-term leases and operated by drivers employed, directed and controlled exclusively by Fry.

Under this system Fry leased motor vehicle equipment from Frank E. Whittington, Inc., a company at Memphis, Tennessee, hereinafter referred to as Whittington, which was engaged in the leasing and maintenance of motor vehicle equipment for industries engaged in the transportation

of the goods manufactured and distributed by such industries.

Of the equipment leased to Fry by Whittington, and used by Fry in the transportation herein involved, Whittington owned all trailers and approximately fifty per cent of the tractors; the remaining fifty per cent of the tractors were leased by Whittington from individual owners thereof and then by Whittington included in its fleet of equipment leased to Fry under its long-term equipment lease with Fry. The individual owners of these tractors were employed by Fry as truck drivers, exactly on the same basis as other truck drivers were employed, with Whittington having no connection with the employment of the drivers by Fry, nor with Fry having any connection with the lease of the tractor units to Whittington by the owners thereof. The relation between Fry and the drivers was a true employer-employee relation, and Fry at all times has had and exercised exclusive control over the drivers and leased equipment, regardless of by whom owned.

The operation of motor vehicle equipment and transportation of merchandise in Arkansas by Fry is and has been wholly interstate in character. The only merchandise transported in Arkansas by Fry or its drivers consisted of merchandise manufactured by Fry at Memphis, Tennessee, and wholly owned by it, being delivered to its customers in Arkansas, or raw materials being returned from Arkansas to Memphis for Volney Felt Mills, without profit to Fry, Volney being a wholly-owned subsidiary of Fry Roofing Company, whose operations at Memphis were under the entire direction and control of Fry.

Simply because Fry's drivers owned the tractor portion of the tractor-trailer being operated in the transportation of Fry's merchandise, representatives of the Arkansas Public Service Commission made a number of arrests of such

drivers, impounded all motor vehicle equipment being operated by them, as well as the merchandise thereon, and averred their intention to continue so to do. Thereby Fry's operations in interstate commerce were unduly burdened and hindered, it was precluded from conducting its lawful business in the sale and distribution of its merchandise, its property was being destroyed, and it was being irreparably injured.

As a result of this unlawful action on the part of representatives of the Arkansas Public Service Commission Fry instituted an injunctive action in the Chancery Court of Pulaski County, Arkansas, resulting in a decree on the 16th day of April, 1951 (R. 223), enjoining and restraining the Arkansas Public Service Commission from illegally interfering with the interstate transportation by the Lloyd A. Fry Roofing Company of its own commodities and those of a wholly-owned subsidiary through the use of motor vehicle equipment leased by it and operated under its exclusive direction and control by its employees, under the illegal guise of enforcement, through criminal action, of the Arkansas Motor Carrier Act, Act 367 of the Acts of 1941.

The charges against Fry's drivers were that they were "contract carriers" as defined by the Arkansas Motor Carrier Act of 1941 (pertinent portions attached as Appendix C).

Only those drivers employed by Fry who owned the tractor portion of the motor equipment involved were arrested, and it is not denied that the transportation service they were performing, as well as all elements of their employment by Fry, were identical with those of all other drivers employed by Fry who did not own tractors. These drivers who were arrested were charged with being "contract carriers" within the meaning of the Arkansas Motor Carrier Act (Appendix C).

The Chancery Court of Pulaski County, Arkansas, in an exhaustive decree containing findings of fact and conclusions of law, held that a bona fide employer-employee relationship existed between Fry and its truck drivers, that Fry was a bona fide lessee of the equipment operated by it, and that Fry was a private carrier by motor vehicle of its own merchandise and that of a wholly-owned subsidiary in interstate commerce (R. 219-223). On appeal the Supreme Court of Arkansas, in a divided opinion, pretermitted findings of material facts and, as we shall demonstrate, without any basis whatsoever in the record, concluded that the equipment leasing arrangement employed by Fry was a scheme and a subterfuge to avoid some regulation which the State of Arkansas might lawfully impose upon the transportation involved. Before turning to the record we reiterate that the decision of the Supreme Court of Arkansas could have been reached only by (1) totally ignoring all the undisputed and material facts of record and (2) the principles of law applicable thereto.

And now, to make specific reference to the record establishing accuracy of the foregoing statements (R. 45, 46), Fry is the largest composition asphalt roofing manufacturer in the United States, at the time of the trial below having nineteen plants located throughout the United States. One of such plants is located at Memphis, Tennessee, from which point roofing is sold and delivered to points in a number of states, including the State of Arkansas. It has a wholly-owned subsidiary, Volney Felt Mills, Inc., which manufactures felt for use by Fry; the operations of Volney are on Fry's premises and are conducted under the direction of Fry's supervisory personnel. The officers and directors of the two corporations are the same (R. 45, 46, 95).

In November, 1949 (R. 116), in connection with a new pricing and merchandising program and in order to enjoy the inherent advantages of the new program and over-

come disadvantages of existing transportation facilities (R. 83-86), Fry determined to deliver its products by utilization of a fleet of motor tractor-trailer units, to be operated by its employees, in the exclusive possession of and under the exclusive and sole direction and control of Fry. Fry, at the same time, did not wish to purchase or maintain the required motor vehicle equipment (R. 62-63, 69, 77-78, 82-83). These motor vehicle units were leased from Frank E. Whittington, Inc., a motor vehicle leasing and maintenance service (R. 23), under long-term written leases, compensation for use thereof being paid upon the basis of running miles (R. 7-14, 25, 70-71, 87-95). At all times and in every respect equipment leased by Fry from Whittington was under the sole and absolute direction and control of Fry (R. 87-88).

At the time of the trial in the lower court in Arkansas, Fry, at Memphis, was leasing eighteen trailers and twelve tractors from Whittington; Whittington owned all of the trailers, same being specially constructed for Fry's use, and seven of the tractors (R. 24, 71, 74-75, 85). Five of the tractors leased by Fry from Whittington were owned by persons employed by Fry as drivers, these persons having leased the tractors to Whittington under written long-term leases, with Whittington then having incorporated same in the fleet of equipment leased by Whittington to Fry under and pursuant to the terms of Whittington's equipment lease agreement with Fry (R. 24, 34-36, 7-14, 70-71).

Infra we shall summarize the terms and provisions of the equipment leases referred to above, but at this point we wish to point out, as established by the record, that Fry had no connection with, control over or knowledge of arrangement between Whittington and person employed by him who were owners of tractors leased to Whittington (R. 76, 100). The record establishes, as well, that Whittington had no connection with employment of drivers by

Fry, and neither did Whittington exercise any supervision over such drivers (R. 32, 38, 63, 105). There was no agreement that drivers employed by Fry would be assigned to the operation of equipment which they might own (R. 38, 76, 87), but, as a matter of sound business practice, when Fry learned that an employee owned equipment which was in its leased equipment fleet, Fry endeavored to assign such employee to the operation thereof (R. 103-104). At no time has it been any concern of Fry as to who owned the equipment which it had leased from Whittington (R. 76). Truck drivers employed by Fry, even though they may own tractors which are in Fry's leased equipment fleet, do not always operate the equipment owned by them (R. 86), and Whittington has absolutely no connection with or control over the equipment leased by Whittington to Fry, nor any direction or control over any driver of such equipment (R. 38-42).

Three forms of equipment leases are in the record, two of which, at various stages, governed the relation between Whittington and the individuals from whom he leased equipment. The third is the equipment lease agreement which, at all times, has been extant between Fry and Whittington. It is the position of Fry that the forms of the equipment leases utilized by Whittington are immaterial in this litigation inasmuch, as we will point out in argument, Fry had no connection therewith and, the first form of equipment lease had been abandoned before institution of the injunctive proceeding in this case. We shall endeavor, further, to point out that utilization of either of the forms was legal under the circumstances and could not justify the action of the respondents herein. The first form of lease utilized by Whittington appears at pages 27-31 of the record; the second form, executed between Whittington and the owners of equipment, and which agreement was in effect when the litigation herein was instituted, appears at pages 34-36 of the record.

The foregoing equipment lease (R. 34 et seq.), being the form of lease utilized by Whittington in its relations with the owners of equipment, establishes ownership of the equipment, recognizes that Whittington is engaged in furnishing motor vehicle equipment under lease to industrial concerns who wish to use same in the transportation of their own property, and that Whittington as lessee wishes to acquire lessor's equipment for such use and purpose; the equipment leased is specifically described; the right to sub-let the equipment is specified; responsibility for maintenance and cost of operation is included; the consideration for the lease is detailed; the duties of lessor with respect to painting, cleaning and polishing are outlined. The lessor agrees to keep in force fire, theft and collision insurance on the equipment, and to maintain same in such manner as to comply with all safety requirements of regulatory bodies; and it is specifically provided that lessee or the concern to whom lessee may sub-let the equipment shall have the full, exclusive and complete use of the leased equipment during the time of the lease, said lease being for a period of three years, with lessee being specifically granted the exclusive authority to sub-lease such equipment to any person of lessee's choosing.

At this point, at the risk of being accused of invading the field of argument, we are constrained to observe that there is no essential difference between the lease being utilized by Whittington on and after March 1, 1950, and that previously utilized by it in the procurement of equipment (R. pp. 27 et seq.), except that in the original form utilized the owner of the equipment agreed to become an employee of Fry. We do not deem this feature to be of any significance, as we will hereinafter demonstrate.

The motor vehicle equipment lease between Whittington and Fry, appearing at pages 7-13 of the record, and this we present is the only agreement of consequence in this

litigation, provides that Whittington leases to Fry certain specifically described motor vehicle equipment, contracts to perform all functions with respect to maintenance and cost of the expense of operation thereof, make regular inspection thereof, furnish substitute vehicles for those out of service by virtue of need for repairs or service; the agreement details the method to be employed in computing compensation to which Whittington is entitled, and by a schedule thereto establishes the rate per mile to be paid for use of such equipment; Whittington, lessor, agrees to procure and maintain, only insofar as the vehicles leased are concerned, insurance against fire, theft, tornado, wind-storm and earthquake damage; lessee, Fry, agrees to procure and maintain adequate public liability and property damage insurance; lessee, Fry, agrees that such motor vehicle equipment will be operated only by its employees, which employees shall be competent to perform the functions assigned to them, and shall be selected, employed, controlled, paid and supervised exclusively by Fry; Fry agrees not to overload the equipment; Fry agrees not to operate the equipment leased in violation of law; and the usual terms with respect to delivery of the equipment at the expiration of the lease, or renewal thereof, are specified.

As is established by the record, a true employer-employee relationship existed between Fry and its truck drivers irrespective of whether they did, or did not own equipment, and there was no distinction whatsoever in the relationship between the petitioner and truck drivers who did or did not own equipment either in the method of employment, compensation or direction and control exercised by Fry over the equipment and truck drivers. Fry's record with respect to all individual drivers involved in the litigation below are exhibits to the official transcript and it is stipulated that these records are representative of the records on employment of all truck drivers by Fry (R.

69-70); by further stipulation only one set of such records has been printed for consideration by this court (R. 241), the stipulation setting forth the reason, in each instance, for the omission of an exhibit in printing.

With respect to all drivers, uniform employment applications are required by Fry (R. 47, 185); Fry conducts investigation as to character and ability and requires a medical examination by a physician of its choice (R. 48); fidelity bonds are required of all truck drivers, with the premiums being paid by Fry (R. 49, 186); all truck drivers are compensated on the basis of so much per running mile, with incidentals, irrespective of cargo, and carried on petitioner's payroll as employees irrespective of whether they do or do not own equipment (R. 50, 57, 188); Fry deducts social security and withholding taxes on all drivers as employees, and carries workmen's compensation insurance on the drivers and pays the premiums therefor; all truck drivers get the benefit of Fry's uniform vacation plan, and the drivers participate, at their election, in group insurance available only to employees of Fry (R. 58, 60, 67, 101); the truck drivers, irrespective of whether they do or do not own equipment are paid by the use of regular employee pay checks (R. 60, 109); Fry alone employs and discharges truck drivers, gives no consideration to whether an applicant for employment owns or does not own motor vehicle equipment, and determines the compensation to be paid to truck drivers which, in all instances, is uniform; there is no difference in compensation paid truck drivers whether they do or do not own equipment, nor is there any variation in the rate paid per running mile depending on the type, character or weight of cargo being transported (R. 61-62).

Fry alone determines when, where, how and what will be transported in leased equipment and by the drivers thereof; Fry does not permit the use of such equipment

for any purpose other than its own, nor its drivers to be employed by any other person (R. 62-63, 69). The drivers have no discretion as to the equipment they will operate (R. 77).

Fry assumes full responsibility for operation of the vehicle as well as safety of cargo, and complies with all of the hours of service and safety regulations of the Interstate Commerce Commission applicable to private carriers (R. 63-66, 77-78, 110, 190).

Neither bills of lading nor way bills are used by Fry in the transportation and delivery of its commodities, a simple delivery ticket being employed (R. 66, 191); reports of defects in equipment being operated by Fry's drivers are made directly to Fry by the drivers and to no other person (R. 68, 192).

Insofar as the State of Arkansas and the issues at bar are concerned, all transportation performed by Fry and its drivers is interstate transportation (R. 45-46); being from Memphis to points in Arkansas of Fry's own merchandise or of raw materials for Volney Felt Mills, Inc., from points in Arkansas to Memphis, Tennessee; no charge is made by Fry for this transportation for its wholly-owned subsidiary (R. 95-96, 116).

The primary business of Fry is the manufacture and distribution of asphalt roofing and during the period in suit utilization of the transportation method under attack resulted in a substantial deficit (R. 78-79, 112-115, 245), but the advantages were thought to justify continuation thereof.

As is reflected by the record, under the guise of enforcing the Arkansas Motor Carrier Act, representatives of the Arkansas Public Service Commission arrested a num-

ber of Fry's drivers making interstate deliveries, impounded and delayed its merchandise and equipment, prevented fulfillment of its contracts with its customers, and averred their contention to continue so to do unless enjoined by the court. Also, as is reflected by the record, no question of taxation or exercise of police power is presented, the sole issue being whether contract carriage was being performed by Fry's drivers without a permit as contract carriers from the Arkansas Public Service Commission (R. 112, 122-136, 138). Only those drivers who owned the tractors then being operated by them as Fry's employees were arrested and no issue has been made by the Arkansas Public Service Commission as to the legality of identical transportation being performed by Fry's drivers who did not own tractors.

Following the repeated arrest of Fry's employees an injunctive action was instituted (R. 1-13) and tried in the Chancery Court for Pulaski County, Arkansas, in which the chancellor made comprehensive findings of fact and conclusions of law (R. 219-223), holding that Fry's equipment leases were bona fide, had been strictly adhered to, that a true employer-employee relationship existed between Fry and all of its truck drivers, and that Fry was a private carrier.

The Arkansas Public Service Commission was enjoined from interfering with Fry or its employees in performance of the described transportation upon the theory that common or contract carriage was being performed (R. 223).

The Supreme Court of Arkansas, on appeal by the Arkansas Public Service Commission, with two justices dissenting (R. 232), reversed the decree of the Chancery Court (R. 225) and held that Fry's drivers who owned tractors which had been leased to Fry through Whittington were contract carriers and perforce must obtain Arkansas

contract carrier permits before they could transport Fry's goods in interstate commerce, and that they were subject to prosecution for violation of the provisions of the Arkansas Motor Carrier Act for having failed so to do. Petition for rehearing was duly filed (R. 234), and denied (R. 237).

As has heretofore been pointed out, prior to approximately March 1, 1950, Whittington employed one form of lease in procuring equipment from the owners thereof (R. 25-31) and subsequent to such date utilized another form (R. 25, 33-36). While Fry had no connection with or knowledge of arrangements between Whittington and the owners of equipment (R. 76, 100); it should be noted that the opinion of the court below is predicated upon analysis of a form of equipment lease not being used when the litigation was instituted or tried, and that as well, the feature of the initial form employed by Whittington found particularly objectionable by the court below, i. e., that the equipment owner procure employment with Fry, was never enforced by Whittington in his relations with the owners of equipment (R. 38, 76, 87), and was omitted entirely in the second form.

All terms and conditions of the written agreement between Whittington and Fry were scrupulously complied with in actual operation (R. 89).

SPECIFICATION OF ERRORS TO BE URGED.

1. Fry is being discriminated against and deprived of its property without due process of law contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. Interstate commerce is being unduly burdened and destroyed contrary to the provisions of Article 1, Section 8, Clause 3, of the Constitution of the United States.

3. The Arkansas Public Service Commission is unlawfully attempting to regulate interstate motor carrier transportation, a field pre-empted by Congress.

4. The lower court erred in not considering whether Fry is a private carrier whose primary business is the manufacture and sale of its products, and in not holding that the transportation of Fry's products could not, at one and the same time, be both private and contract carriage.

5. The lower court erred in not considering whether a bona fide employer-employee relationship existed between Fry and its truck drivers, and in not holding that, in the transportation of Fry's products the truck drivers could not, at one and the same time, be both bona fide employees and contract motor carriers.

6. The lower court erred in not considering that no element of interstate contract motor carrier transportation was present in the relationship between Fry and its drivers and in the transportation of Fry's products.

7. The lower court erred in considering that ownership of motor vehicle equipment was determinative of whether contract carriage was being performed therewith, and in failing to consider the extent to which Fry exercised con-

trol over the equipment and driver thereof as being material in determining the type carriage being performed.

8. Fry's equipment leases were bona fide, scrupulously observed in actual operation, and were not adopted to avoid compliance with the Arkansas Motor Carrier Act.

9. No weight has been given by the court below to decisions of the Interstate Commerce Commission relating to interstate commerce. They are entitled to great weight.

10. Under the undisputed facts of record the only permit which the Arkansas Public Service Commission might lawfully grant would be for the performance of intrastate transportation, whereas the only transportation involved is interstate.

11. The decision below is predicated on a factual basis having no support in the record.

SUMMARY OF ARGUMENT.

Petitioner, Lloyd A. Fry Roofing Company, is a large manufacturer and distributor of asphalt roofing products; as a part of a new merchandising and distributing program it determined to distribute its products by the use of motor vehicle equipment operated by its employees under its exclusive direction and control; such motor vehicle equipment was procured on the basis of long-term equipment leases from an equipment leasing and maintenance organization. The equipment consisted of tractors and specially constructed trailers, rental therefor being paid on the basis of running miles, irrespective of cargo transported therein.

The only goods transported in leased equipment were goods owned by Fry or a wholly owned subsidiary, the latter transportation being performed without cost to the subsidiary, and the over-all transportation operation was performed at a loss. Insofar as this litigation is concerned the only transportation performed by the use of leased equipment was wholly interstate in character.

Fry had and exercised exclusive direction and control over leased motor vehicle equipment, regardless of by whom owned, and directed when and how same was to be operated, the cargo to be transported thereon, and assumed complete responsibility for the cargo thereon and the operation thereof.

Fry employs a number of truck drivers, a portion of whom own tractors which they lease to the equipment leasing and maintenance service subscribed to by Fry, this service incorporating such tractors in the fleet of equipment leased to Fry by the service. Whether an applicant for employment as a truck driver owns motor vehicle equipment is of no concern to Fry, and Fry has no knowl-

edge of or connection with relations between the equipment leasing service and the individual owner of a tractor. The employment of all truck drivers by Fry is on exactly the same basis, irrespective of whether they do or do not own equipment, and, in all respects, a true employer-employee relationship exists between Fry and all of its truck drivers, all of whom are compensated on the basis of so much per running mile, union scale, and all of whom are, in identically the same manner, supervised, directed and controlled by Fry.

Congress has enacted what is popularly known as Part II of the Interstate Commerce Act, pre-empting the field of interstate motor carrier transportation. Pursuant to the authority granted by Congress, the Interstate Commerce Commission has promulgated rules and regulations governing interstate motor carrier transportation. The Interstate Commerce Act contains definitions of common, contract and private motor carriers. In the case at bar we are concerned with the definitions of contract and private carriers as set forth in said Act, and they are attached hereto as Appendix A.

In 1941, as Act No. 367 of the Acts of Arkansas, the legislature of Arkansas enacted what is popularly known as the Arkansas Motor Carrier Act, designed to regulate intrastate transportation in Arkansas. Pertinent portions of this Act are attached as Appendix C. It is to be noted that the Arkansas Act contains no definition of "private carrier," but that by Section 5 (b) thereof it is specifically provided that the Act shall not be construed to include "any private carrier of property." The Arkansas Act, further, by Section 25 thereof, provides that it shall be construed to apply to interstate or foreign commerce only insofar as such application may be permitted under the provisions of the Constitution of the United States and the Acts of Congress.

In the early part of 1950 the Arkansas Public Service Commission launched upon a program of harassment of Fry's operations, arresting its drivers, impounding its equipment, and preventing fulfillment of its contracts with its customers for the delivery of goods in interstate commerce by arresting its drivers for failing to have a contract carrier permit issued by the Arkansas Public Service Commission. This molestation of Fry's interstate operations was enjoined following a chancery court proceeding, and the decree of the chancery court was reversed by the Supreme Court of Arkansas, in a divided opinion.

The principal bases of our argument shall be that the respondents herein, a state regulatory body, under a statute designed to permit regulation of intrastate commerce, are invading the field of interstate motor carrier transportation, which field has been pre-empted by Congress; (2) that interstate commerce is being unduly burdened and destroyed; (3) that Fry is being deprived of its property without due process of law; (4) that Fry is a private carrier within the meaning of the Interstate Commerce Act and, perforce, at one and the same time its truck drivers cannot be contract carriers in transporting its products; (5) that a bona fide employer-employee relationship exists between Fry and its truck drivers and that, such being the case, while acting as employees of Fry the truck drivers cannot at one and the same time be contract carriers; that the court below failed to take cognizance of or apply the "primary business" test enunciated by this court in determining whether private or contract carriage was being performed and, as well, failed to give any weight whatsoever to decisions of the Interstate Commerce Commission relating to interstate motor carrier transportation.

As an incidental issue we shall take the position that the opinion of the majority of the court below is predicated on a factual basis having absolutely no support in the record.

ARGUMENT.

We beg leave to state, in limine, that we realize the number of errors specified to be urged is unusually large, but respectfully present that the specification is a conservative presentation of the errors committed by the Supreme Court of Arkansas.

In view of the importance of the principles involved, not only to the petitioner in this case, but to the private motor carrier industry at large, and also to a proper determination thereof as an aid to the Interstate Commerce Commission in enforcement of Part II of the Interstate Commerce Act and as an aid to the regulatory bodies of the 48 states, all of whom have statutes comparable to that of the State of Arkansas governing motor carrier transportation, we plead the indulgence of the court in presentation of our views with respect to the numerous errors specified.

The court, we believe, will take judicial notice of the fact that motor carrier transportation constitutes a very important segment of the over-all transportation system of the nation. The significance of private motor carrier transportation was graphically portrayed by representatives of the Private Carrier Conference of the American Trucking Association in hearings before the Committee on Interstate and Foreign Commerce, United States Senate, 82nd Congress, 2nd Session, on "Bills Relative to Domestic Land and Water Transportation,"¹ on March 3 to April 9, 1952, in which it was established that as of that time private carriers of property had in operation 4,358,000 units of motor vehicle equipment, excluding farm and government vehicles, or a total of 77.6% of all motor transportation vehicles being operated in the United States. At the same

¹ "Hearings before the Committee on Interstate and Foreign Commerce, U. S. Senate, 82nd Congress, 2nd Session, on Bills Relative to Domestic Land and Water Transportation," March 3 to April 9, 1952, pages 685 et seq.

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time for-hire carriers had 1,258,000 units in operation, or a total of 22.4% of the total number of motor vehicles transporting property in the United States.

Thus, the decision of this court in this case will be determinative of the rights of all state regulatory bodies to exercise supervision over interstate transportation which is being performed by private carriers operating 4,358,000 units of motor vehicle equipment to the extent that such operations are performed by the use of leased equipment.

Our principal thesis shall be that the "primary business" test as enunciated by this court and the Interstate Commerce Commission determines whether a carrier is a private carrier; that the direction and control of the equipment and the driver thereof by the carrier rather than ownership of equipment is determinative of the status of the carrier, and that a person at one and the same time cannot be a bona fide employee of a private carrier, as such term is defined by the Interstate Commerce Act, and a contract carrier, as such term is defined by state legislation; and, to state the same premise differently, if an employee is a contract carrier under state legislation, then his employer cannot be a private carrier as such term is defined by federal legislation.

At this point, and in order to avoid repetition hereinafter, we respectfully direct the attention of the court to the pertinent statutory provisions involved. As Appendix "A" we quote from Part II of the Interstate Commerce Act, Title 49, U. S. Code, sections 301 et seq., containing the definitions of "contract carrier by motor vehicle," "private carrier of property by motor vehicle," and the general sections of the Act relative to the duties of the Interstate Commerce Commission with respect to such carriers; then, as Appendix "B," we quote the "National Transportation Policy Enunciated by Congress," U. S.

Code, Title 49, notes preceding sections 1301, 901 and 1001; then, as Appendix "C," we quote pertinent portions of the Arkansas Motor Carrier Act, Act 367 of the Acts of Arkansas, 1941, and direct attention to the fact that such Act specifically provides that nothing therein shall be construed to include any private carrier of property, and that it contains no definition of private carrier of property. Then, as Appendix "D," we quote from regulations of the Arkansas regulatory body, from which it will be seen that an application for an interstate contract carrier permit must be accompanied by a copy of authority granted by the Interstate Commerce Commission, with no other provision being made for the granting by the Arkansas regulatory body of interstate contract carrier operating authority except upon the conditions quoted.

The Decision Below Sanctions Invasion by a State of a Field of Interstate Commerce Pre-empted by Congress.

The transportation involved in this litigation is solely interstate motor carrier transportation of property. No intrastate transportation has been or is proposed to be performed, and the attempt by the state to regulate this transportation is perforce an attempt to regulate interstate transportation.

Article 1, Section 8, Clause 3 of the Constitution of the United States provides:

"The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

It has long been the fundamental law of the land that no part of the power to regulate commerce that is vested in Congress can be executed by a state and that such power, so far as it is thus vested belongs exclusively to Congress. **Gibbons v. Ogden**, 22 U. S. 1, 6 L. Ed. 23.

And it is fundamental law, as well, that the Commerce Clause of the Constitution of the United States establishes the immunity of interstate commerce from the control of the states respecting all those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation must be prescribed by a single authority, and that authority is the Congress of the United States. **Edwards v. People of the State of California**, 314 U. S. 160, 62 S. Ct. 164, 86 L. Ed. 119; **Milk Control Board v. Eisenberg Farm Products**, 306 U. S. 346.

It is established, as well, that whenever Congress exercises its power to regulate commerce between the states all conflicting state laws must give way, **Huison v. Lott**, 75 U. S. 148, 19 L. Ed. 387; **U. S. v. Hill**, 248 U. S. 420, 63 L. Ed. 337, and that when the United States has exercised its exclusive powers over interstate commerce so far as to take possession of the field, the states can no more supplement its requirements than they can annul them. **Pennsylvania R. v. Public Service Commission of Penn.**, 250 U. S. 566, 40 S. Ct. 36, 63 L. Ed. 1142.

And stated differently, the elementary and long settled doctrine is that the moment Congress exercises its paramount and all-embracing authority in the regulation of interstate commerce the power of the state with respect thereto ceases to exist, because there can be no divided authority over interstate commerce, and the regulations of Congress on that subject are supreme. **Chicago, Rock Island and Pacific R. Company v. Hardwicke Farmers' Elevator Company**, 226 U. S. 466; and where Congress has by an expression of its will occupied a field that action is conclusive of any right to the contrary asserted under state authority. **State of Wisconsin v. City of Duluth**, 96 U. S. 379, 24 L. Ed. 668.

Furthermore the power and acts of Congress with respect to regulation of interstate commerce are established

to be exclusive. **Missouri Pacific R. v. Stroud**, 267 U. S. 404, 45 S. Ct. 243, 69 L. Ed. 683; **City of Newark v. Central R. of New Jersey**, 267 U. S. 377, 45 S. Ct. 238, 69 L. Ed. 663.

And it is equally well established that a state may not enforce any law, the necessary effect of which is to prevent, obstruct or burden interstate commerce. **LaCoste v. Department of Conservation of the State of Louisiana**, 263 U. S. 545, 44 S. Ct. 186, 68 L. Ed. 437; **Schwab v. Richardson**, 263 U. S. 88, 44 S. Ct. 60, 68 L. Ed. 183.

• "Burdens upon interstate commerce" are those actions of a state which directly impair the usefulness of facilities for such commerce, **Morgan v. Commonwealth of Virginia**, 328 U. S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317, and a state may not regulate or create a burden of traffic in interstate commerce. **United States v. Whiting Milk Company**, 97 F. (2d) 667; **McDermott v. Wisconsin**, 228 U. S. 115, 33 S. Ct. 431, 57 L. Ed. 754; **Savage v. Jones**, 225 U. S. 501, 32 S. Ct. 715, 56 L. Ed. 1182. Nor may states lawfully enact or endeavor to enforce measures tending directly to regulate, obstruct or interfere with commerce confided to paramount control of Congress or which may be inconsistent with federal legislation. **Ziffrin Inc. v. Martin**, 24 F. Supp. 924, affirmed 308 U. S. 132, 60 S. Ct. 163, 84 L. Ed. 128.

If, therefore, it is established that the commerce involved is interstate commerce, that the field thereof has been pre-empted by Congress, and that such commerce is being burdened, hindered and obstructed by officials of the State of Arkansas, under the guise of deeming such commerce to be contract motor carrier transportation within the meaning of a state statute, then the decision of the Supreme Court of Arkansas should be reversed. We present that the Congress has pre-empted the field of interstate contract motor carrier transportation.

On the 9th day of August, 1935, and as amended from time to time, Congress enacted Part II of the Interstate Commerce Act, and thereby fully pre-empted the field of interstate motor carrier transportation. This part of the Interstate Commerce Act appears as Title 49, U. S. Code, Sections 301 et seq. We do not cite the Statutes at Large at this point inasmuch as we believe such would be unduly burdensome to the Court. Insofar as contract carriage is concerned, Title 49, U. S. Code, Section 303 (15), 54 Stat. L. 920, defines same to be:

“The term ‘contract carrier by motor vehicle’ means any person which, under individual contracts or agreements, engages in transportation (other than transportation referred to in paragraph (15) of this section and the exception therein) [common carrier transportation] by motor vehicle of passengers or property in interstate or foreign commerce for compensation.”

The same section at sub-section (17) defines “private carrier” as follows:

“The term ‘private carrier of property by motor vehicle’ means any person not included in the terms ‘common carrier by motor vehicle’ or ‘contract carrier by motor vehicle,’ who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent or bailment, or in furtherance of any commercial enterprise.”

By U. S. Code, Title 49, Section 304 (2), the Congress provided that it should be the duty of the Interstate Commerce Commission

“to regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to

uniform systems of accounts, records, and reports, presentation of records, qualifications and maximum hours and service of employees, and safety of operation and equipment."

And further, by U. S. Code, Title 49, Section 304 (6), 52 Stat. L. 1237, the Interstate Commerce Commission is empowered:

"To administer, execute and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations and procedure for such administration . . ."

There then follows an enumeration of various powers of the Commission with respect to regulation of interstate motor carrier transportation, with the specific provision at U. S. Code, Title 49, Section 304 (c), 54 Stat. L. 922:

"Upon complaint in writing to the Commission by any person, state board, organization or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission after notice and hearing find upon investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of the opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint."

And then, in the immediately following sub-section, it is provided:

"The provisions of sections 14 and 16 (13) of part I relating to reports, decisions, schedules, contracts, and

other public records, shall apply in the administration of this part."

Without further quotation from Part II of the Interstate Commerce Act, it should be pointed out that the following sections of Title 49 of the United States Code reflect the extent to which Congress has pre-empted the field of interstate motor carrier contract transportation. At section 309 Congress has invested the Interstate Commerce Commission with authority to issue permits covering contract motor carrier transportation, prescribed the powers of the Commission with respect thereto and established procedures to be followed; at section 318 of said Title, Congress has covered entirely the questions of contracts by contract carriers by motor vehicle, minimum rates and charges, the filing of contracts with the Interstate Commerce Commission, publishing and keeping open for inspection in manner and form prescribed by the Commission of schedules containing minimum rates or charges, reductions in charges, and the powers of the Commission with respect thereto. This section, as well, delineates the authority of the Commission to regulate contract carrier transportation, investigate complaints with respect thereto, and to modify, suspend, or cancel contract carrier permits. Further, at section 234 of said Title the Interstate Commerce Commission is invested with authority to prescribe the accounts, records and memoranda to be kept by contract motor carriers as well as reports to be made thereon and the forms thereof. And, as will appear from Title 49, Chapter 1, sub-chapter B, Parts 165 et seq. of the Code of Federal Regulations, the Interstate Commerce Commission has, to the full extent of its authority, promulgated rules and regulations covering every feature and phase of interstate contract motor carriage.

It having been demonstrated, therefore, that Congress has pre-empted the field of interstate motor transportation,

that under Article 1, Section 8, Clause 3 of the Constitution of the United States it has the exclusive power and authority to regulate such transportation, that the Interstate Commerce Commission has made no charge, complaint or ruling that petitioner is other than a private carrier within meaning of the Interstate Commerce Act, and that officials of the State of Arkansas, attempting to regulate such transportation under and by virtue of the contract carrier features of the Arkansas Act are hindering, delaying, obstructing and unduly burdening interstate commerce, and that petitioner is thereby being deprived of its property without due process of law, it results that the decision of the Supreme Court of Arkansas should be reversed.

At this point it should be noted that the Supreme Court of Arkansas bases its decision upon the conclusion that Section 5 (a) (8) of the Arkansas Motor Carrier Act, the definition of "contract carrier" was intended to be "all inclusive" (R. 226). In the first place, such finding is negated by the numerous exclusions contained in section 5 (b) of the Act itself as well as by section 25 thereof. Among other things, section 5 (b) (3) specifically provides that the Act shall not apply to any private carriers, and section 25 permits application thereof to interstate commerce only insofar as such application will be permitted by the provisions of the Constitution of the United States and Acts of Congress (Appendix C):

If it was the intention of the drafters of the Arkansas Motor Carrier Act that the definition of contract carrier should be "all inclusive," and if the construction placed thereon by the Arkansas Supreme Court is correct, then in that event the Act on its face is unconstitutional in that it seeks to invade a field wholly pre-empted by Congress.

**The Decision of the Court Below Permits Interstate
Commerce to Be Unduly Burdened, Interfered
With, Hindered and Destroyed.**

It is established by the record that Fry and its drivers were engaged solely in interstate commerce, and that by the action of the representatives of the state regulatory body it was prevented from selling and delivering its merchandise in interstate commerce and fulfilling contracts with its customers; it is admitted of record, as well, that in each instance when petitioner's drivers were arrested they were engaged in the performance of interstate transportation, and that respondents propose to continue such arrests and prevent petitioner from delivering its goods by the means employed and performance of its contracts, unless enjoined from so doing.

It is respectfully presented that by the foregoing actions and threatened actions of the representatives of respondents that interstate commerce, contrary to Article 1, Section 8, Clause 3 of the Constitution of the United States, is being unduly burdened, hindered and destroyed by a state regulatory body in the enforcement of a state statute designed to permit the regulation of intrastate commerce.

The decisions of this court well establish that a state may not enforce any law, or enforce any law in a manner the necessary effect of which is to prevent, obstruct or burden interstate commerce, a burden upon interstate commerce being any action of the state which directly impairs the usefulness of facilities for such commerce. It cannot be denied that by the arrests of petitioner's drivers and delay and impoundment of its equipment the interstate commerce in which petitioner was engaged was being burdened and hindered by the attempted enforcement of the Arkansas Motor Carrier Act by the respondent therein. The decision of the court below, in approving such action,

is perforce contra to the decisions of this court enunciating the foregoing principles. **LaCoste v. Department of Conservation of the State of Louisiana**, 263 U. S. 545, 44 S. Ct. 186, 68 L. Ed. 437; **Schwab v. Richardson**, 263 U. S. 88, 44 S. Ct. 60, 68 L. Ed. 183; **Morgan v. Commonwealth of Virginia**, 328 U. S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317; **McDermott v. Wisconsin**, 228 U. S. 115, 33 S. Ct. 431, 57 L. Ed. 754; **Savage v. Jones**, 225 U. S. 501, 32 S. Ct. 715, 56 L. Ed. 1182.

It is obvious that, if the decision of the court below is correct, no private carrier of property, regardless of its primary business and regardless of the extent to which it exercises direction and control over the driver and operation of leased equipment, may perform interstate transportation in the delivery of its products without its employees procuring contract carrier permits from state regulatory bodies. Such, we present, unduly burdens, interferes with, hinders and destroys interstate commerce.

**The Court Below Gave No Weight to Decisions of the
Interstate Commerce Commission—No Element
of Interstate Contract Motor Carrier
Transportation Is Involved.**

This court has plainly said that in matters of interstate transportation the opinions of the Interstate Commerce Commission are entitled to great weight. **U. S. et al. v. American Trucking Assoc.**, 310 U. S. 534, 60 S. Ct. 1059; **Levinson v. Spector Motor Service**, 330 U. S. 649. The admonition of this court in these cases was utterly ignored by the majority opinion below, but was recognized in the minority opinion (R. 225, 232).

It should be recalled that we are here confronted with a factual situation uncontradicted of record, and not found to be otherwise by the court below, where the owner of

motor vehicle equipment leased same to an intermediary equipment maintenance and leasing service which, in turn, leased same to a private carrier, the owner thereof being employed in a bona fide manner as an employee of such private carrier, and, at the will of the private carrier, drives the equipment owned by him. In **Watson Mfg. Co., Inc., Common Carrier Application**, 51 Motor Carrier Cases 223, the Interstate Commerce Commission had before it a situation where the owner of such equipment leased same directly to the carrier and was directly employed by the private carrier to drive his own equipment. In the **Watson** case, supra, the Interstate Commerce Commission specifically held that the owner of motor vehicle equipment could lease same to a private carrier and then be employed by the carrier as the driver thereof without becoming a contract carrier within the meaning of the Interstate Commerce Act [U. S. Code, Title 49, Section 303 (a) (15)]. Such Act is the only legislation applicable to the case at bar inasmuch as interstate transportation alone is involved. The foregoing decision of the Interstate Commission is not only entitled to great weight but should be controlling in determining whether interstate carriage in the case at bar is being performed.

Furthermore, the Interstate Commerce Commission has long since enumerated those aspects of motor carrier transportation which must be present before it can be said that contract carriage is being performed. It is significant that while the court below concludes that as a matter of law Fry's drivers are contract carriers within the meaning of the Arkansas Motor Carrier Act, that there is no factual finding by the court of **any single element** held by the Interstate Commerce Commission to be essential for motor carrier transportation to be interstate contract carriage.

For example, the Interstate Commerce Commission has held that interstate contract carriage entails the execution

of a mutual contract between carrier and shipper for a definite period of time, for the transportation of specific commodities in a definitely described territory or between specified points at specified filed and published minimum weights and charges; such contract containing minimum rates and charges must be approved by the Interstate Commerce Commission, and in such contracts the rights, duties and obligations of both carrier and shipper must be well defined, the shipper be obligated to furnish some definite or easily ascertainable amount of freight during the term of the contract, or for a given period, and the carrier bound to transport the freight agreed to be shipped for the consideration specified in the contract. See **Contracts of Contract Carriers**, 1 Motor Carrier Cases 628; **Filing of Contracts by Contract Carriers**, 2 Motor Carrier Cases 55; **Western Transport Co., Contract Carrier Application**, 2 Motor Carrier Cases 107.

The opinion of the court below does not allude to either the existence or non-existence of any of the foregoing elements, and it is undisputed of record that the only agreement between the petitioner and its truck drivers was an oral agreement of indeterminate duration under which the drivers were simply employed to drive trucks at the will of petitioner for a specified union rate per mile, and without regard to character or quantity of cargo to be transported or the destination thereof, but simply to act as truck drivers in transporting petitioner's goods if, as, when, where and how petitioner should elect and under petitioner's exclusive direction and control.

We respectfully submit that insofar as interstate motor carrier transportation is concerned, the foregoing decisions of the Interstate Commerce Commission are entitled to great weight, and that if given any weight whatsoever the decision of the court below cannot stand.

Petitioner Is Being Deprived of Its Property Without Due Process of Law.

It is respectfully presented that the decision of the court below sanctions actions of a state regulatory body which abridge the privileges of petitioner and deprive it of its property without due process of law.

No question of the legitimacy of petitioner's business being involved, nor of its compliance with all police tax and safety laws and regulations of the State of Arkansas, it is petitioner's position that it should be permitted to sell and deliver its goods in interstate commerce in motor vehicle leased to and operated by it with employees of its own choosing, without hindrance from the State of Arkansas until, by some state or federal court or governmental agency having jurisdiction, its operations shall have been held to be illegal. This has not been done.

If petitioner is a private carrier of goods solely in interstate commerce, then its employees also solely engaged perforce cannot be said to be contract carriers within the meaning of the Arkansas Motor Carrier Act.

The Arkansas Motor Carrier Act, being Act 367 of 1941, contains ample authority for the Arkansas Public Service Commission to conduct investigations thereunder and to enforce its provisions by application to the courts of Arkansas; similarly Part II of the Interstate Commerce Act, which we have discussed in detail, supra, invests the Interstate Commerce Commission with ample authority, either by complaint proceedings before the Commission itself or by civil or criminal actions instituted in the federal courts, to enforce the provisions of such Act upon carriers subject thereto engaged in interstate transportation.

It is significant that the status of Lloyd A. Fry Roofing Company as a private carrier with respect to the transpor-

tation herein involved has neither been challenged in administrative proceedings before any state or federal body, nor has any action been instituted against petitioner in any court challenging the status of Fry as a private carrier.

It is presented, therefore, that interference with petitioner's operations, by the indirect means of arresting its driver and impounding its equipment under a state statute, which action has been sanctioned by the decision of the court below, is in contravention of section 1 of the 14th Amendment to the Constitution of the United States, which provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

Thus, without the validity of its operation having been challenged before any administrative body or tribunal having jurisdiction, by indirection in the attempted enforcement of a state statute, the rights and privileges of petitioner to engage in interstate commerce have been abridged and it is being prevented from fulfilling contracts and engaging in a legitimate enterprise in the sale and distribution of its products.

The Decision of the Court Below Contravenes the National Transportation Policy as Enunciated by Congress.

On September 18, 1940, as a part of the Interstate Commerce Act, the Congress enacted an amendment to the Act popularly known as the "National Transportation Policy" (54 Stat. L. 899, U. S. Code, Title 49, notes preceding sections 1, 301, 901 and 1001) which, in pertinent part, is reproduced herein as appendix B.

This statute requires fair and impartial regulation of all modes of transportation subject to the Interstate Commerce Act, and we construe the statute to mean that the same standards will be applied in determining whether common or contract as distinguished from private motor carrier transportation is being performed.

The decision of the court below plainly contravenes such National Transportation Policy as enunciated by Congress, as well as decisions of this court handed down in implementation thereof.

The decision of the court below ignores entirely the undisputed fact that at all times the leased motor vehicle equipment was under the **exclusive** direction and control of Fry, and the decision below is obviously predicated on the sole question of ownership of equipment being operated by Fry's drivers. Thus, although no question is made by the pleadings or in the record but that a bona fide employer-employee relationship existed between petitioner and all of its truck drivers (which fact the decision of the court below also entirely ignores) the practical effect of the decision below is that petitioner's employees driving their own equipment leased to petitioner are contract carriers, whereas the other truck drivers employed by it and supervised on exactly the same basis, are not affected by the contract carrier provisions of the Arkansas Motor Carrier Act.

We know of no decision of this court dealing directly with the question whether exercise of direction and control or ownership of motor vehicle equipment is determinative of whether contract carriage is being performed, but the Interstate Commerce Commission, as well as this court, in determining whether **common or other carriage** was being performed, and by whom, have held that the person who assumed full responsibility for the direction, operation and control of the equipment and acknowledged responsi-

bility to the public therefor, was the carrier, irrespective of ownership of the equipment. **Floyd H. Johnson-Extension**, 17 Motor Carrier Cases 733, 740; **Performance of Motor Common Carrier Service by Riss and Company, Inc.**, 48 Motor Carrier Cases 327, 359; **Thomson v. United States**, 321 U. S. 419, in all of which decisions the "control and responsibility test" was recognized as being determinative of the carrier status of affected persons.

The decision of the court below obviously applies solely the "ownership test" and ignores the "control and responsibility" test in determining whether contract carriage within the meaning of the Arkansas Motor Carrier Act was being performed.

We submit that, with respect to interstate commerce, neither the Congress, this court nor the Interstate Commerce Commission contemplated that in effectuation of the National Transportation Policy the "control and responsibility test" was to be applied in determining whether common or private carriage was being performed and that the "ownership test" was to be applied in determining whether contract or private carriage was being performed within the meaning of either the Interstate Commerce Act or the Arkansas Motor Carrier Act.

The Opinion of the Majority of the Court Below Ignored Undisputed Facts of Record and Is Based on Unwarranted Conclusions and Misapplication of Decisions of United States District Courts.

We do not take the position that this court should review findings of fact made by the Supreme Court of Arkansas. We do take the position, however, that the Supreme Court of Arkansas made no findings of fact on essential undisputed facts of record which, if considered at all, would have precluded the result below, and that the

decision below is predicated solely on conclusions having no factual basis in the record.

An examination of the opinion of the majority of the Supreme Court of Arkansas (R. 225 et seq.) will disclose that the court made no finding with respect to whether petitioner was or was not a private carrier exercising exclusive direction and control over motor vehicle equipment leased by it and of the drivers thereof; in the next place the court below made no finding as to whether a bona fide employer-employee relationship existed between petitioner and its truck drivers, irrespective of whether they own the equipment being operated by them; in the next place the court below made no finding with respect to whether or not the terms and conditions of Fry's equipment lease agreement was or was not scrupulously complied with in actual operations and, finally, the court below refused to consider whether the "primary business" test was of any significance in determining the issues at bar.

We deem consideration of the foregoing matters to be essential to a determination of whether the involved interstate transportation is private, contract or common carriage within the meaning of the Interstate Commerce Act. A review of the record in this case will conclusively establish that there is no conflict in the evidence with respect to any material fact determinative of the questions above, that the written equipment lease agreements were scrupulously complied with in actual operation, that a bona fide employer-employee relationship existed between petitioner and all of its truck drivers, and that petitioner was in truth and in fact a private carrier transporting its goods in interstate commerce.

It is respectfully presented that if petitioner, engaged solely in interstate commerce, is a private carrier within the meaning of the Interstate Commerce Act, and as a

matter of law and of fact if a bona-fide employer-employee relationship exists between petitioner and its truck drivers, then it would be impossible for petitioner's truck drivers at one and the same time and in the performance of the same transportation to be contract carriers within the meaning of the Arkansas Motor Carrier Act.

We believe it fundamental, as well, that the court should have taken into consideration the undisputed fact that petitioner had and exercised exclusive direction and control not only over the equipment operated by it and the cargo transported therein, but over the drivers thereof as well.

In this connection we respectfully present that we cannot conceive of a decision, upon the undisputed facts of record, being well-founded without a preliminary determination of whether the Lloyd A. Fry Roofing Company is in truth and in fact a private carrier within the meaning of the Interstate Commerce Act, U. S. Code, Title 49, section 303 (17), 54 Stat. L. 920 which category is therein defined as follows:

"The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle' who or which transports in interstate or foreign commerce by motor vehicle property by which such person is the owner, lessee, or bailee, and such transportation is for the purpose of sale, lease, rent, or bailment or in furtherance of any commercial enterprise."

There is no question in the record but that at the times petitioner's drivers were arrested they were transporting petitioner's goods in equipment being operated under petitioner's exclusive direction and control. Neither is there any question in the record but that at such times such

goods were owned by petitioner and were being transported "by petitioner as the owner thereof for the purpose of sale."

We inevitably, therefore, come to the question of determination of whether petitioner was a private carrier within the meaning of the Interstate Commerce Act. This court has established the principle that the primary business of an establishment delivering goods by the use of motor vehicle equipment determines whether it is a private, contract or common carrier. Such, as well, has been the consistent ruling of the Interstate Commerce Commission with respect to interstate motor carrier transportation. The decision of the court below is based upon a refusal to consider applicability of the "primary business" test enunciated by this court and the Interstate Commerce Commission. In **Brooks Transportation Co. et al. v. United States of America et al.**, 93 F. Supp. 517, affirmed per curiam 340 U. S. 925; **Lenoir Chair Company—Contract Carrier Application**, 48 Motor Carrier Cases 259, and **Schenley Distillers Corp.—Contract Carrier Application**, 48 Motor Carrier Cases 405, it was clearly established that if the primary business of the carrier is that of the manufacture, sale and distribution of its products, rather than transportation, that it is not a contract carrier within the meaning of the Interstate Commerce Act.

It is uncontradicted of record, although this fact was not alluded to by the court below, that the only transportation being performed by petitioner or its drivers was of goods owned by petitioner or its wholly-owned subsidiary Volney Felt Mills; that such transportation was being performed at a loss to petitioner and with no charge being made to the subsidiary for the incidental transportation performed on its behalf.

Clearly, then, under the decisions of this court and of the Interstate Commerce Commission the Lloyd A. Fry

Roofing Company is a private carrier of property within the definition of such term contained in the Interstate Commerce Act, inasmuch as its primary business is the manufacture and sale of asphalt roofing products and not motor carrier transportation.

It results, therefore, that had the foregoing applicable principles been applied to the undisputed facts of record petitioner's drivers, in transporting petitioner's products, with petitioner being a private carrier, could not at one and the same time be contract carriers within the meaning of the Arkansas Motor Carrier Act.

In the next place, the Supreme Court of Arkansas failed to consider whether a bona fide employer-employee relationship existed between petitioner and its truck drivers. That such relationship did exist is not disputed of record and neither is it decided by the court below not to have existed. The trial court found that such relationship did exist (R. 219 et seq.). Such being the case, we respectfully urge, as a fundamental issue in the case at bar, that petitioner's truck drivers could not at one and the same time be employees of petitioner as a private carrier and, in the performance of the same transportation, be contract carriers within the meaning of the Arkansas Motor Carrier Act.

The decision of the majority of the Supreme Court of Arkansas is based upon a refusal to consider (1) whether petitioner was a bona fide private carrier; (2) whether a bona fide employer-employee relationship existed between petitioner and its truck drivers; (3) and the extent to which petitioner exercised exclusive direction and control over the transportation being performed. Such decision results, as well, from a refusal to apply legal principles enunciated by this court and the Interstate Commerce Commission to determine the status of interstate motor carrier transportation, and the erroneous application of United States District Court decisions thereto.

The action of the representatives of the Arkansas Public Service Commission^o resulted from enunciation by such commission of a "Conference Ruling and Order" appearing at pages 199-200 of the record and attempted enforcement thereof. This "Conference Ruling and Order" of the Arkansas Commission clearly tracks the opinion of the United States District Court in **Interstate Commerce Commission v. F. and F. Truck Leasing Corporation et al.**, 78 F. Supp. 13. Without conceding validity of the conference ruling and order it should be pointed out that at pages 87 et seq. of the record and pages 38 et seq. thereof, by witnesses for both petitioner and respondents, it is established without contradiction that no violation thereof is present in the case at bar, and that even under the provisions of same no transportation subject to the provisions of the Arkansas Motor Carrier Act has been performed.

*We shall not, unless forced so to do by the reply brief of respondents, endeavor to point out wherein the lower court decisions relied upon by the Supreme Court of Arkansas in its opinion are easily distinguishable from the issues involved in the case at bar. Suffice it to say, in the cases relied upon by the Supreme Court of Arkansas, the "responsibility and control" test was wholly ignored and the "ownership" test was applied as the paramount consideration in determining whether private or contract carrier was being performed.

The majority opinion of the Supreme Court of Arkansas, without any foundation whatsoever in the record, as is observed by the minority opinion (R. 232 et seq.) is predicated on a conclusion that the equipment leases between Whittington and petitioner are not bona fide leases, because the duration thereof does not exactly coincide with the duration of leases between Whittington and owners of motor vehicle equipment. The opinion overlooks the fact that the lease between Whittington and petitioner is itself

for a term of three years, but that it also provides for a change or substitution of equipment covered thereby from time to time by agreement of the parties, as well as the fact that in actual operation the equipment has been changed from time to time (R. 7-14, 43, 71).

The opinion of the court below further overlooks the undisputed fact that petitioner had no connection whatsoever with the arrangement between Whittington and the persons from whom he might have leased equipment, and had no knowledge thereof or control thereover, and that Whittington had no connection with the employment of drivers by Fry nor any control over their operations.

It is to be particularly noted that the opinion of the majority of the court below does not find that the equipment lease agreements involved were not scrupulously complied with in actual operation.

The only response to the conclusion of the opinion of the majority of the court below that petitioner's transportation system was adopted as a "subterfuge" that can be made is that which is found in the minority opinion, i. e., **there is simply no iota of evidence in the record to support such conclusion.** The opinion of the majority below is predicated upon three erroneous premises: (1) That the definition of "contract carrier" contained in the Arkansas Motor Carrier Act is or was intended to be "all inclusive"; (2) that petitioner is seeking to enjoy the benefits of some privilege which the Arkansas Public Service Commission might grant; and (3) that petitioner is seeking to avoid some supervision which the Arkansas Public Service Commission might lawfully exercise.

If petitioner is, in truth and in fact, a private carrier, if its truck drivers are its employees and a true employer-employee relationship exists between petitioner and its

truck drivers, and if the transportation being performed is interstate transportation, then, by indirection the Arkansas Public Service Commission is attempting to do that which it cannot do by direction, preventing the performance of private interstate motor carriage in Arkansas by petitioner by the utilization of equipment and employees of its own choosing; thereby freedom of contract and of action is being impaired, interstate commerce is being unduly hampered, burdened and destroyed, and petitioner is being deprived of its property without due process of law, while a state regulatory body invades a field of interstate transportation pre-empted by Congress.

**The End Sought by the Arkansas Commission
Is Impossible of Attainment.**

Petitioner's employees have been arrested and are being prosecuted for failing to have contract carrier permits issued by the Arkansas Public Service Commission under the provisions of the Arkansas Motor Carrier Act. (Appendix C.)

Petitioner herein takes the position that, under the undisputed facts of record, the only contract carrier permit which the Arkansas Public Service Commission could grant to petitioner's employees would be for the performance of intrastate transportation, whereas the only transportation involved in this proceeding is interstate transportation. This position is predicated upon the rules and regulations of the state regulatory body promulgated by it under duly vested authority. Pertinent portions of such rules and regulations are attached hereto as Appendix D.

It is to be noted that as a prerequisite to the granting of an interstate permit the carrier must file a copy of the operating authority granted to it by the Interstate Com-

merce Commission. Petitioner's truck drivers have no contract carrier authority from the Interstate Commerce Commission, inasmuch as under the rulings of such Commission petitioner is a private carrier and its drivers are its bona fide employees.

Further, other prerequisites of the Arkansas Public Service Commission for the obtaining of an interstate contract carrier's permit cannot be met by petitioner's drivers. There is no contract between petitioner and its drivers for the transportation of any specific commodity over any given route or between any specified point. Petitioner's drivers simply transport petitioner's products in quantities designated by petitioner over any route designated by petitioner and to any point designated by petitioner. Neither can petitioner's drivers satisfy the prerequisite of the Arkansas Public Service Commission that a description of the equipment to be used be furnished inasmuch as petitioner alone designates the equipment to be used, and the financial status of petitioner's drivers is immaterial to petitioner inasmuch as it assumes complete responsibility for the safety of the cargo and operation of the leased motor vehicle equipment.

The practical effect of the decision of the Arkansas Supreme Court is to sanction criminal prosecution of petitioner's employees for failure to satisfy the foregoing requirements of the Arkansas Public Service Commission which, under the undisputed facts in this case, have no application to the transportation involved, and any permit which petitioner's drivers might obtain from the Arkansas commission would be for the performance of intrastate transportation, none of which has been or will be performed.

CONCLUSION.

It is respectfully submitted, therefore, that the judgment of the Supreme Court of Arkansas should be reversed and the decree of the Chancery Court for Pulaski County, Arkansas, should be affirmed.

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APPENDIX "A."

Part II, Interstate Commerce Act, Title 49, U. S. Code, Sections 301 et seq.:

"Section 303. (a) As used in this part— . . . (15)
the term 'contract carrier by motor vehicle' means
any person which, under individual contracts or agree-
ments, engages in the transportation (other than trans-
portation referred to in paragraph (14) and the ex-
ception therein [common carrier transportation] by
motor vehicle of passengers or property, in interstate
or foreign commerce for compensation."

"Section 303. (a) As used in this part— . . . (17)
the term 'private carrier of property by motor vehicle'
means any person not included in the terms 'common
carrier by motor vehicle' or 'contract carrier by mo-
tor vehicle', who or which transports in interstate
or foreign commerce by motor vehicle property of
which such person is the owner, lessee, or bailee, when
such transportation is for the purpose of sale, lease,
rent, or bailment, or in furtherance of any commercial
enterprise."

"Section 304. (a) It shall be the duty of the Com-
mission— . . . (2) to regulate contract carriers by
motor vehicle as provided in this part, and to that end
the Commission may establish reasonable require-
ments with respect to uniform systems of accounts;
records and reports, preservation of records, quali-
fications and maximum hours of service of employees,
and safety of operations and equipment."

"(3) To establish for private carriers of property
by motor vehicle, if need therefor is found, reason-
able requirements to promote safety of operations,
and to that end prescribe qualifications and maximum
hours of service of employees, and standards of
equipment . . ."

APPENDIX "B."

National Transportation Policy Enunciated by Congress
(54 Stat. L. 899 U. S. Code, Title 49, Notes Preceding Sections 1, 301, 901 and 1001):

"It is hereby declared to be the National Transportation Policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each. . . ."

APPENDIX "C."

Act 367 of the Acts of Arkansas, 1941, Arkansas Motor Carrier Act:

"Section 3. The provisions of this Act, except as hereinafter specifically limited, shall apply to the transportation of passengers or property by motor carriers over public highways of this state, and, to the procurement of, and provision of, facilities for such transportation; and the regulation of such transportation, and the procurement thereof and the provision of facilities therefor, is hereby vested in the Arkansas Corporation Commission.¹

"Section 4. Nothing herein shall be construed to interfere with the exercise by agencies of the Government of the United States [sic.] or its power of regulation of interstate commerce.

"Section 5. (a) As used in this Act—

"(7) the term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly or indirectly, or by a lease of equipment or franchise rights, or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public by motor vehicle for compensation whether over regular or irregular routes.

"8. The term 'contract carrier by motor vehicle' means any person, not a common carrier included under paragraph 7, Section 5 (a) of this Act who or which, under individual contracts or agreements and whether directly or indirectly or by a lease of equipment or franchise rights, or any other arrangement,

¹ Under Act 40 of the Acts of Arkansas, 1945, the powers previously vested in the Arkansas Corporation Commission were transferred to the Arkansas Public Service Commission.

transports passengers or property by motor vehicle for compensation.

“Section 5. (b) Nothing in this Act shall be construed to include . . . (3) any private carrier of property.

“Section 6. (a) It shall be the duty of the Commission (1) to regulate common carriers by motor vehicle as provided in this Act . . . (2) to regulate contract carriers by motor vehicle as prescribed by this Act . . .

“Section 11. (a) No person shall engage in the business of a contract carrier by motor vehicles over any public highway in this state unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such persons to engage in such business . . . ”

“Section 22. (a) Any person knowingly and willfully violating any provision of this Act . . . shall, upon conviction thereof, be fined not more than \$100.00 for the first offense and not more than \$500.00 for any subsequent offense . . . ”

“Section 25. The terms and provisions of this Act shall be construed to apply to interstate or foreign commerce only insofar as such application may be permitted under the provisions of the Constitution of the United States and the Acts of Congress.”

APPENDIX "D."

Pertinent excerpts from "Rules and Regulations Governing Motor Carriers" promulgated by the Arkansas Corporation Commission, whose functions and duties and enforcement of such rules and regulations were assumed by the Arkansas Public Service Commission pursuant to Act 40 of the Acts of Arkansas of 1945, are as follows:

Instructions for Filing Applications.

"1. Formal application must be filed with the Arkansas Corporation Commission upon forms furnished by the Commission. Said application must contain the petitioner's name, place of business and post office address; a detailed description of the route over which the applicant desires to operate, a description of the equipment to be used, a full and complete financial statement, giving assets and liabilities, accompanied by a map showing the routes of the proposed operation.

"(a) If the proposed operation is freight service, the application must state the commodities to be transported, whether special or general, and whether the carrier is common or contract.

"(b) If applicant is a contract carrier an executed copy of the contract must accompany the application. All contracts must be approved by the Commission."

Interstate.

"5. For an **Interstate** permit you must also file application, accompanied by a \$25.00 filing fee. Also send a copy of your authority granted by the Interstate Commerce Commission. It will not be necessary for you to appear in person as the Commission does not require a formal hearing on interstate applications, but you must file your public liability, property damage, and cargo insurance with the Arkansas endorsement attached, countersigned by an Arkansas agent."